IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT
STATE OF ALABAMA

CHRISTOPHER MCCULLOUGH, #174909 * CR. NO. 03-1103
PETITIONER, * TRIAL COURT
VS. * CASE NO: CC-2002-318
STATE OF ALABAMA, *
RESPONDENT, * 3:07CV26-mef

INITIAL BRIEF OF PETITIONER
ORAL ARGUMENT REQUESTED

CHRISTOPHER MCCULLOUGH
W.E. DONALDSON #174909
100 WARRIOR LANE
BESSEMER, ALABAMA 35023
PRO SE

STATEMENT REGARDING ORAL ARGUMENT

ORAL ARGUMENT IS RESPECTFULLY REQUESTED. THE FACTUAL AND LEGAL ARGUMENTS PRESENTED IN THE BRIEFS AND RECORDS AND THE DECISIONAL PROCESS WOULD BE SIGNIFICALLY AIDED BY ORAL ARGUMENT

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STATEMENT OF THE CASE

ON OR ABOUT AUGUST 5, 2002 I WAS INDICTED BY THE CHAMBERS COUNTY GRAND JURY FOR THE CHARGE OF ATTEMPTED BURGHARY 1ST DEGREE WITH A WEAPON IN my POSSESSION.

I WENT TO JURY TRIAL ON NOVEMBER 13TH and 14th OF 2003 AND WAS FOUND GUILTY AS THE INDICTMENT CHARGED AND SENTENCED TO FORTY YEARS IMPRESONMENT.

AT SENTENCING JUDGE RAY MARTIN DID VIOLATE HIS JUDICIAL DISCRETION.

AT THIS JURY TRIAL ON NOVEMBER 13TH & 14TH OF 2003 HE VIOLATED HIS JUDICIAL DISCRETION BY GIVING IMPROPER JURY CHARGE TO THE JURY AND REAUSED TO GIVE THE REQUESTED JURY CHARGES.

JUDGE RAY MARTIN DID VIOLATE HIS JUDICIAL DISCRETION BY REAUSING TO RESPOND TO THE JURY'S 2 QUESTIONS WHEN THEY SHOWED DIFFICULTY ON DECIDING THE EVIDENCE.

DISTRECT ATTORNEY BELL LISENBY DID ADMIT FALSE EVIDENCE AT THIS JURY TRIAL TO WIT; A BLUE SKI MASK.

CASE WAS AFFIRMED BY THE COURT OF CRIMINAL APPEALS. CERT. DENIED TO ALABAMA SUPREME COURT. THEN I FILED POST-CONVICTION RULE 32 TO CHAMBERS COUNTY CIRCUIT ON MARCH 29, 04 ON WHICH IT WAS DENIED ON SETEMBER 26, 2005 ON WHICH IN THE 18 MONTH TIME SPAN THE JUDGE DID NOT GIVE ME A EVIDENTIARY HEARING AS I REQUESTED.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. VERDICT WAS CONTRARY TO THE LAW AND THE WEIGHT OF THE EVIDENCE.

II. ADMISSION OF FALSE EVIDENCE.

III. TRIAL JUDGE GAVE IMPROPER JURY CHARGE, REFUSED TO ANSWER JURYS QUESTIONS, REFUSED TO GIVE REQUESTED JURY CHARGE, AND VIOLATED HIS DISCRETION AT MY SENTENCE HEARING.

IV. ILLEGAL SEARCH AND SEIZURE OF VEHICLE.

V. CONFLICTED TESTIMONY OF STATE WITNESS.

VI. PRIVILEGE AGAINST SELF-INCRIMINATION.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL.

VIII. THE VALUE OF A WAIVER OF RIGHTS FORM.

STATEMENT OF FACTS

I WAS CONVICTED OF ATTEMPTED BURGLARY 1ST DEGREE ON NOVEMBER 13TH AND 14TH 2003. PRIOR TO THE JURYS VERDICT BEING CONTRARY TO LAW AND TO THE WEIGHT OF THE EVIDENCE AN DIRECT APPEAL FOLLOWED ON WHICH WAS AFFIRMED BY THE COURT OF CRIMINAL APPEALS AND CERTIORARI WAS DENIED BY ALABAMA SUPREME COURT. POST-CONVICTION RULE 32 WAS FILED AND I PROCEEDED AS PRO SE ON MARCH 19, 2004 AND IT WAS DISMISSED ON SEPTEMBER 25, 2005 WITHOUT EVIDIENTIARY HEARING. SEVERAL ISSUES WAS RAISED ON THIS POST-CONVICTION PETITION WHICH WAS WARRANTED FOR EVIDIENTIARY HEARING. I DID NOT RECEIVE NOTIFICATION OF DISMALL UNTIL DECEMBER 2006 AFTER I WROTE THE CIRCUIT CLERK FOR UPDATE STATUS.

SUMMARY OF ARGUMENT

THE JURYS VERDICT WAS CONTRARY TO LAW AND THE EVIDENCE.

STATE DID NOT PROVE THAT I WAS IN POSSESSION OF A WEAPON WHEN THIS ALLEGED CRIME TOOK PLACE.

TRIAL JUDGE VIOLATED HIS DISCRETION TWICE DURING THE PHASE OF THIS JURY TRIAL. DISTRICT ATTORNEY SUBMITTED OR ADMITTED FALSE EVIDENCE CONFLICTED TESTIMONY BY WITNESS'S FOR THE STATE. PRIVILEGE AGAINST SELF-INCRIMINATION INEFFECTIVE ASSISTANT OF COUNSEL AND THE VALUE OF AN WAIVER OF RIGHTS FORM.

ARGUMENT

STANDARD OF REVIEW

CORROBORATION WAS INSUFFICIENT WHERE, BUT FOR ACCOMPLICES TESTIMONY AND THE DEPUTY'S HEARSAY REFERENCES TO THE OTHER ACCOMPLICES STATEMENTS, THERE WAS NO EVIDENCE TENDING TO CONNECT DEFENDANT WITH THE COMMISSION OF THE CRIME; THE EVIDENCE UPON WHICH DEFENDANT WAS CONVICTED EMANATED MERELY FROM THE BARE STATEMENTS OF THE ACCOMPLICES.

EX PARTE HARDLEY, 766 So. 2d 154 (1999). ALA. LEXIS 337 (ALA. 1999).

I. VERDICT WAS CONTRARY TO LAW AND THE WEIGHT OF THE EVIDENCE.

THIS COURT WILL REVIEW THE ISSUE OF WHETHER THE JURY'S VERDICT WAS CONTRARY TO LAW IF DEFENDANT CAN DISCLOSE THAT THE WEIGHT OF THE EVIDENCE WAS IN HIS FAVOR. DEFENDANT CONTENDS THAT AT THIS JURY TRIAL ON NOVEMBER 13TH AND 14TH OF 2003 THAT THERE WAS COMPLETE CONFLICT REGARDING THE WITNESS TESTIMONY FOR THE STATE, AND ONE OF THE STATEMENTS THE STATE WITNESS MADE ON THE DAY OF THE INCIDENT. AT THIS JURY TRIAL MRS. PEARL TRAMMELL THE HIRED HELP TESTIFIED AT THIS TRIAL RIGHT BEFORE MRS. JUDITH GRAGGS DID MRS. PEARL TRAMMELLS STATEMENT SAID THAT SHE WAS POSITIONED IN THE BACK OF THE HOUSE WHERE SHE WAS FOLDING SOME CLOTHES ON WHICH SHE SAW A VERY TALL BLACK MALE WITH A BANDANNA AROUND HIS FACE LOOKING INTO A WINDOW.

AND SHE ALSO STATES AFTER SHE SAW THIS ONE MAN SHE NOTIFIED THE GRAGGS IMMEDIATELY. AFTERWARDS SHE STATED THAT SHE AND JUDITH GRAGG WENT TO A BEDROOM ALSO LOCATED AT THE BACK OF THE HOUSE AND SAW SOMEONE RUNNING IN THE GRAGGS BACKYARD. AT TRIAL MRS. TRAMMELL TESTIMONY GOES AS FOLLOWS: SHE PROCLAIMS THAT SHE WAS AT THE BACK OF THE HOUSE FOLDING CLOTHES WHEN SHE SAW A VERY TALL BLACK MAN LOOKING INSIDE A BACK WINDOW AND THAT SHE SAW ANOTHER MAN WITH A SKI-MASK AT THE FRONT OF THE HOUSE. THIS TESTIMONY ALONE IS CONTRADICTORY BECAUSE IF SHE WAS POSITIONED IN THE BACK OF THE HOUSE IT WAS SIMPLY IMPOSSIBLE FOR HER TO VIEW THE SIDE OR THE FRONT OF THIS VERY LARGE HOUSE. THEN SHE GOES ON TO SAY THAT SHE AND MRS. JUDITH GRAGG BOTH WENT INSIDE OF A BEDROOM TO LOOK OUT A WINDOW AND THEY BOTH SAW TWO MEN RUNNING TOWARD THE BARN IN THE BACKYARD. SHE TESTIFIED THAT THEY WERE STANDING SIDE BY SIDE WHEN THIS ACT OCCURRED. MRS. JUDITH GRAGG THEN CAME TO THE WITNESS STAND TO TESTIFY RIGHT AFTER MRS. PEARL TRAMMELL AND SPECIFICALLY STATED UNDER OATH THAT SHE WAS NOT GOING TO LIE AND TESTIFIED THAT WHY SHE AND MRS. TRAMMELL WERE LOOKING OUT THIS BEDROOM WINDOW SHE SAW ONE MAN RUN THROUGH HER BACKYARD AND DESCRIBED EXACTLY ON WHAT HE WAS WEARING ON THIS DAY. SHE SAID THAT THE MAN THAT SHE SAW WAS VERY TALL AND HAD ON A WHITE T-SHIRT AND BLUE JEANS WHICH SHE DESCRIBED ON WHAT BILLY NORRIS HAD ON THIS DAY TO THE EXACT CAPACITY. SHE TESTIFIED THAT HE WAS THE ONLY PERSON THAT SHE SAW ON HER PROPERTY. MRS. TRAMMELL WAS ASKED BY DEFENSE ATTORNEY ON WHAT I WAS WEARING SHE PROCLAIMED THAT SHE DID NOT REMEMBER.

MR. MIKE GRAGGS THEN TESTIFIED AND STATED THAT HE DID NOT SEE ANY ONE ON HIS PROPERTY AND THAT HE WENT SOLELY BY WHAT HIS WIFE HAD TOLD HIM. MORE CONTRADICTION IS THAT BOTH WOMEN TESTIFIED THAT THEY WERE LOOKING OUT THE SAME WINDOW AT THE SAME TIME BUT MRS. JUDITH GRAGG WHO IS THE OWNER OF THIS HOUSE SAYS THAT SHE SAW ONE MAN ON HER PROPERTY AND MRS. PEARL TRAMMELL WHO WAS THE HIRED HELP STATED THAT SHE SAW TWO MEN. I STAND TO CHALLENGE THAT AT THIS JURY TRIAL MRS. JUDITH GRAGGS TESTIMONY SHOULD HAVE OUTWEIGHED MRS. PEARL TRAMMELL TESTIMONY ON WHICH WAS IN MY FAVOR. THIS ALONE SHOWS THAT THE JURYS VERDICT WAS SUPPORTED BY INSUFFICIENT EVIDENCE.

THE JURY IS SUPPOSED TO COLLATE AND APPRAISE THE INDEPENDENT EVIDENCE AGAINST EACH DEFENDANT SOLELY UPON THE DEFENDANTS OWN ACTS. MOBLEY V. STATE, 563 SO. 2D 9 (ALA. CRIM. APP. 1990). AND THE UNDISPUTED TESTIMONY OF ALL WITNESS THAT STATES THAT ON MARCH 19, 2002 DAY OF THIS INCIDENT, THAT NO ONE SAW ANY GUN OR SAID ANYTHING ABOUT ANY ONE HAVING A GUN. THIS TESTIMONY OF THREE OF THE STATE WITNESSES ON WHICH WERE THE PEOPLE WHO OCCUPIED THIS RESIDENCE ON THE DAY OF ALLEGED CRIME ELIMINATED ANY USE OF A WEAPON INVOLVED IN THIS ALLEGED CRIME. THE ALABAMA LAW IS WELL SETTLED THAT IF A DEFENDANT IS ACCUSED OF COMMITTING A CRIME WITH A WEAPON AND ALL THE EVIDENCE TEND TO SHOW THAT IT WAS DONE WITHOUT A WEAPON THERE IS A FATAL VARIANCE BECAUSE THE GUN CONSTITUTES THE SERIOUSNESS OF THE CHARGE, MICHIES CRIMINAL CODE ANNOTATED (2003).

THERE FOR THE JURY MADE AN INCOMPETENT DECISION ON FINDING ME GUILTY AS THE INDICTMENT CHARGED SOLELY BASED ON INSUFFICIENT EVIDENCE. IF ALL THE EVIDENCE SHOWS THAT NO WEAPON WAS USED TO COMMITT THIS ALLEGED CRIME THEN THE JURY COULD NOT FIND ME GUILTY OF COMMITTING THIS OFFENSE WITH A WEAPON. THEREFORE THE STATUE OF THIS CRIME IS DEDUCTED FROM CLASS A TO CLASS C ON WHICH ATTEMPTED BURGLARY 3RD DEGREE IS KNOWN OR CONSIDERED AS CRIMINAL TRESPASS 1ST DEGREE WHICH IS AN CLASS A MISDEMEANOR. THEREFORE THE JURY WAS INCOMPETENT AND WAS WITHOUT JURISDICTION TO PASS SUCH VERDICT.

II. ADMISSION OF FALSE EVIDENCE

I THE DEFENDENT CONTEND THAT THE DISTRICT ATTORNEY BILL LISENBY DID WILLINGLY ADMITT FALSE EVIDENCE TO WIT A BLUE SKI MASK ON WHICH THE LANETT POLICE DEPARTMENT OFFICERS NEVER TOOK OFF ME AT THIS STOP. THE VIDEO TAPE OF THIS STOP DISCLOSES THAT I WALKED AWAY WITH THIS SKI-MASK AND DISPOSED OF IT AT THE LANETT POLICE DEPARTMENT. THE ONLY THING ON WHICH MADE ME A PARTY TO THIS CRIME WAS THE SKI-MASK ON WHICH THEY NEVERED TOOK FROM ME. SO THE SKI-MASK THAT HE PRESENTED AT THIS JURY TRIAL WAS FALSE EVIDENCE. THIS VIDEO TAPE WILL DEFINITELY SHOW THIS

III. TRIAL JUDGE GAVE IMPROPER JURY CHARGE, REFUSED TO ANSWER JURYS QUESTIONS, REFUSED TO GIVE REQUESTED JURY CHARGE, AND VIOLATED HIS DISCRETION AT MY SENTENCING HEARING.

I THE DEFENDANT DO HEREBY CONTEND THAT JUDGE RAY MARTIN GAVE ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THE OFFENSE OF ATTEMPTED BURGLARY 2ND DEGREE. I CONTEST THAT THIS JURY CHARGE WAS ERRONEOUS AND IMPROPER BECAUSE AFTER ALL THE EVIDENCE WAS PRESENTED BY THE STATE AND DEFENDANT IT SHOWED THAT NO WEAPON WAS INVOLVED IN THIS ALLEGED CRIME SO BY NO WEAPON BEING USED TO COMMITT THIS ALLEGED CRIME IT CONSTITUTED AND WARRANTED FOR A LESSER INCLUDED OFFENSE, 14TH AMENDMENT STATES THAT NO STATE SHALL DEPRIVE ANY PERSON OF LIFE LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW. DUE PROCESS REQUIRES THAT A LESSER INCLUDED OFFENSE INSTRUCTION BE GIVEN ONLY WHEN THE EVIDENCE WARRANTS SUCH AN INSTRUCTION WOODS V. STATE, 485 So. 2d 1243 (ALA. CRIM. APP. 1986) AT THIS JURY TRIAL THE EVIDENCE DEFINITELY WARRANTED A LESSER INCLUDED OFFENSE OF ATTEMPTED BURGLARY 3RD DEGREE WHICH IS CONSIDERED AS AN ACT OF CRIMINAL TRESPASSING AN CLASS A MISDEMEANOR. JUDGE RAY MARTIN GAVE THE JURY CHARGE OF ATTEMPTED BURGLARY 2ND DEGREE ON WHICH IS NOT A LESSER INCLUDED OFFENSE OF ATTEMPTED BURGLARY 1ST DEGREE. (SEE MICHIES CRIMINAL CODE ANNOTATED 2003). THIS IS REVERSIBLE ERROR PREJUDICIAL ALSO THE JURY SHOW DIFFICULTY CONTEMPLATING OVER THE EVIDENCE ON WHICH THEY ASKED JUDGE RAY MARTIN FOR HIS HELP THEY POSED TO QUESTIONS TO HIM TO SPECIFY THEIR DIFFICULTIES. ① WAS THERE ANY FINGER PRINTS ON THE GUN. ② DID HE HAVE A CHANCE TO WRITE HIS OWN STATEMENT.

HIS RESPONSE WAS QUOTE-UNQUOTE (I AM NOT GOING TO ANSWER ANY OF YOUR QUESTIONS, YOU HEARD ALL OF THE EVIDENCE YOURSELFS YOU MUST DECIDE ON THE EVIDENCE THAT YOU HEARD.)

A TRIAL JUDGE HAS SOME OBLIGATION TO MAKE REASONABLE EFFORTS TO ANSWER A QUESTION FROM THE JURY.

WHEN A JURY EXPLICIT ITS DIFFICULTY AT TRIAL A TRIAL JUDGE SHOULD CLEAR THEM AWAY WITH CONCRETE ACCURACY.

DEUTCSH V. STATE, 610 SO. 2D 1212 (ALA. CRIM. APP. 1992).

ALSO AT SENTENCING HEARING JUDGE RAY MARTIN DID VIOLATE HIS DISCRETION BY VIOLATING THE RULES OF COURT RULE 26.9 (D) AFFORD THE DEFENDANT AN OPPURTUNITY TO MAKE A STATEMENT IN HIS OWN BEHALF BEFORE IMPOSING SENTENCE.

HE ALSO VIOLATED HIS DISCRETION ON THE GROUNDS OF THE JUDGE DID NOT ASK THE COURT GENERALLY IF THERE WAS ANYTHING FURTHER FROM ANYBODY. THIS IS A PROPER ALLOCUTION.

JONES V. STATE, 555 SO. 2D 333 (ALA. CRIM. APP. 1989).

AND BY REVIEWING ALL THE EVIDENCE AT THIS JURY TRIAL HE KNEW THAT THE CO-DEFENDANT WAS NOT CORROBORATED THIS CONSTITUTES THE FOLLOWING AUTHORITY

ALTHOUGH JURY'S DECISION CONCERNING SENTENCE IS TO BE GIVEN CONSIDERATION BY THE TRIAL JUDGE, HE MAY ACCEPT OR REJECT THAT VERDICT.

HOOKS V. STATE, 534 SO. 2D 329 (ALA. CRIM. APP. 1987).

[13A-5-47] (C.) BEFORE IMPOSING SENTENCE THE TRIAL COURT SHALL PERMIT THE PARTIES TO PRESENT ARGUMENTS CONCERNING THE EXISTENCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AND THE PROPER SENTENCE IMPOSED IN THE CASE

IT IS APPARENT THAT THE JURYS VERDICT IS CLEARLY DIVERGENT FROM THE EVIDENCE AND THE LAW AND AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE.

IV. ILLEGAL SEARCH AND SEIZURE OF VEHICLE

FOURTH AMENDMENT: THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED AND THE PERSONS OR THINGS TO BE SEIZED.

ON MARCH 19, 2002 OFFICER ROBBIE BETTES OF THE LANETT POLICE DEPARTMENT STOP MY MUSTANG IN A CEMETARY ABOUT 200 YARDS FROM THE ALLEGED RESIDENCE ON WHICH HE PROCLAIMED THAT THE PASSENGER OF MY VEHICLE BILLY MORRIS WAS SEEN HOLDING A GUN LOOKING THROUGH A WINDOW. SO DO SEVERAL MORE OFFICERS STATE THIS SAME ALLEGATION. THAT IS THE REASON THEY SEARCHED MY AUTOMOBILE. THEY SEARCHED EVERY PORION OF THIS VEHICLE WHICH INCLUDES: THE ARMREST, GLOVE COMPARTMENT, UP UNDER ALL SEATS, INSIDE OF THE 2 DOORS, ALL OF THE TRUNK AREA, INSIDE FACTORY RIMS AND TIRES, THE ENGINE, AND FINALLY BEHIND THE BACK PASSENGER SEATS. ON NOVEMBER 13TH AND 14TH I WENT TO JURY TRIAL ON WHICH ALL THREE WITNESS'S DISCLOSED THAT NEITHER ONE OF THEM SAW A GUN OR SAID ANYTHING ABOUT ANY ONE HAD A GUN. I CONTEND THAT THESE OFFICERS MADE A FALSE ALLEGATION TO SEARCH MY AUTOMOBILE. THIS IS WHAT THEY USED AS AUTHORIZATION TO OVERRIDE ANY CONSENT THAT I HAD TO SEARCH THIS CAR.

IF MY MEMORY SERVES ME RIGHT THIS ILLEGAL SEARCH LAST AT LEAST AN HOUR OR SO ON WHICH I HAD STATED QUOTE-UNQUOTE [HOW MANY TIMES ARE Y ALL GOING TO SEARCH MY CAR.] THIS WHEN AN OFFICER KNELED DOWN BESIDE BILLY NORRES AND STARTED TALKING THEN AFTER ABOUT 2 OR 3 MINUTES THE OFFICER STOOD UP AND TOLD DT. RICHARD CARTER SOMETHING. THEN THE OFFICER PICKED BILLY NORRIS OFF OF THE GROUND AND WALKED HIM TO A PATROL CAR AND PLACED HIM IN THE BACKSEAT. THEN AN POLICE OFFICER PICKED ME UP AND THEY ASKED ME IF I WAS SURE THAT NO GUNS WERE IN MY VEHICLE I TOLD THEM QUOTE-UNQUOTE [I DO NOT HAVE ANY GUNS IN MY CAR AND THEIR BETTER NOT BE ANY GUNS IN MY CAR.] THATS WHEN A OFFICER WALKED ME TO THE SAME CAR WITH THE SKI MASK IN MY BACK POCKET AND PLACED ME IN THE SAME PATROL CAR IN THE BACKSEAT BESIDE BILLY NORRES. THIS CAR WAS SOME DISTANCE FROM MY MUSTANG ON WHICH AFTER THEY PLACED ME IN THE PATROL CAR IS WHEN THEY SAID THAT THEY FOUND THE WEAPONS. I STAND TO CHALLENGE THIS ISSUE IN THIS HABEAS CORPUS BECAUSE POSSESSION OF A SKI-MASK ONLY CREATES SUSPICION MERE SUSPICION ALONE IS NOT SUFFICIENT BASIS FOR FINDING OF "PROBABLE CAUSE." IVEY V. STATE 709 So. 2d 502 (ALA CRIM. APP. 1997.)

IN DETERMINING WHETHER THERE IS PROBABLE CAUSE TO SEARCH, FACT THAT CONTRABAND WAS ULTIMATELY DISCOVERED CAN NOT BE CONSIDERED TO SUPPLY PROBABLE CAUSE. SHIPMAN V. STATE, 291 ALA. 484, 282 So. 2d 700

THIS IS MERITORIOUS TO ESTABLISH THE FACT THAT I DID HAVE AN LEGITIMATE EXPECTATION OF PRIVACY IN THE AREA SEARCHED.

FACT THAT POLICE OFFICER, WHILE MOVING SUSPECTS VEHICLE FROM AREA WHERE IT WAS ILLEGALLY PARKED, OBSERVED PISTOL IN FLOOR BOARD OF VEHICLE DID NOT PROVIDE OFFICER WITH PROBABLE CAUSE TO SEARCH VEHICLE, EVEN THOUGH SUSPECT HAD PRIOR FELONY CONVICTIONS FOR SELLING CONTROLLED SUBSTANCE AND PERSONS CONVICTED OF CERTAIN VIOLENT CRIMES WERE PROHIBITED BY STATUE FROM POSESSING PISTOL; SUSPECTS CONVICTION WAS NOT CRIME OF VIOLENCE, AND HIS POSSESSION OF PISTOL WAS THEREFORE NOT ILLEGAL. BEASLEY LYKES JR. V. STATE 709 So. 2d 1325 (ALA. CRIM. APP. 1997.)

I HAD ONE PRIOR FELONY BEFORE THEY CONDUCTED THIS ILLEGAL SEARCH AND SEIZURE TO WIT: 1993 RECEIVING STOLEN PROPERTY 2ND DEGREE CLASS C FELONY!

V. CONFLICTED TESTIMONY OF STATE WITNESS'S

SEE PAGES 5, 6, AND 7 OF BRIEF.

VI. PRIVILEGE AGAINST SELF-INCRIMINATION

FIFTH AMENDMENT SPECIFICALLY STATES THAT NO DEFENDANT SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF.

I TESTIFIED AT THIS TRIAL THAT I WAS NEAR THE GRAGGS PROPERTY AND ONLY ENTERED THEIR LAND TO STOP THE CO-DEFENDANT BILLY MORRIS FROM COMMITTING ANY CRIME DUE TO THE PRESCENCE OF MRS. PEARL TRAMMELL AND THAT IS THE REASON THAT NO CRIME WAS COMMITTED.

NEITHER ONE OF US DID NOT ATTEMP TO BURGLARIZE THIS RESIDENCE AT ANY TIME ON MARCH 19, 2002. I ALSO TESTIFIED TO THE TRUTH THAT I ONLY WAS THERE TO OBSERVE BILLY MORRIS COMMIT AN SIMPLE CRIMINAL ACT FOR VERIFICATION TO STREET MEMBERS ON WHICH HE WANTED TO JOIN. BUT WHEN HE TOLD ME THAT SOMEONE WAS PRESENT IN THE HOUSE I CALLED IT OFF. ON WHICH THE LAW IS WELL SETTLED THAT THIS CONSTITUTES ABANDONMENT FROM ALL EFFORTS [13A-4-2]

ANOTHER TACK IS AS LONG AS DEFENDANTS ACTS ARE EQUIVOCAL IT CANNOT BE SAID THAT HE HAS AN INTENT TO COMMIT A CRIME, AS LONG AS THIS QUALITY OF EQUIVOCATION REMAINS THERE IS NO ATTEMPT. [13A-4-2]

MERE PRESENCE OF AN INDIVIDUAL AT THE TIME AND PLACE OF A CRIME DOES NOT MAKE HIM A PARTY TO THAT CRIME

EX PARTE G.G., 601 So. 2d 890 (ALA. 1992)

WHERE IT WAS APPARENT THAT THE STATE PROVED APPELLANT WAS PRESENT AT THE SCENE, BUT FAILED TO PROVE THAT APPELLANT WAS THERE TO ASSIST ANYONE PRESENT TO COMMIT A BURGLARY, WHILE AIDING AND ABETTING WAS AN ISSUE FOR THE JURY TO DECIDE, THERE WAS NOT ENOUGH EVIDENCE PRESENTED BY THE STATE IN THE CASE FOR THE MATTER TO GO TO THE JURY, AND APPELLANTS MOTION TO EXCLUDE SHOULD HAVE BEEN GRANTED

PRANTL V. STATE, 462 So. 2d 781 (ALA. CRIM. APP. 1984)

REMOTE PREPARATORY ACTS REASONABLY IN A CHAIN OF CAUSATION DO NOT CONSTITUTE AN ATTEMPT. HUGGINS V. STATE, 41 ALA. APP. 548, 142 So. 2d 915 CERT. DENIED 273 ALA. 708, 145 So. 2d 918 (1962.)

SOME AUTHORITIES HELD THAT WHERE THERE WAS INSUFFICIENT OR UNSUITABLE MEANS EMPLOYED BY THE DEFENDANT SO THAT THE INTENDED CRIME COULD NOT BE WHOLLY COMPLETED, OR, OTHERWISE THERE WAS IMPOSSIBILITY OF ACHIEVEMENT, THERE CAN BE NO LIABILITY FOR AN ATTEMPT TO COMMIT SUCH CRIME.

WHERE THERE WAS NO EVIDENCE OF DEFENDANTS FAILURE TO CONSUMMATE THE CRIME OF BURGLARY IN THE THIRD DEGREE, WHICH WAS A NECESSARY ELEMENT OF ATTEMPT, THE CHARGE OF ATTEMPT WAS NOT NECESSARY OR PROPER.

HOLLINS. V. STATE, 415 So. 2d 1249 (ALA CRIM. APP. 1982)

COURT HELD THAT MERE PRESENCE AT THE SCENE WAS INSUFFICIENT TO PROVE APPELLANTS GUILT UNDER A THEORY OF COMPLICITY.

JONES V. STATE, 481 So. 2d 1183 (ALA. CRIM. APP. 1985.)

IN ORDER THAT THERE MAY BE AN ATTEMPT TO COMMIT A CRIME WHETHER STATUTORY OR COMMON LAW, THERE MUST BE SOME OVERT ACT IN PART EXECUTION OF THE INTENT TO COMMIT THE CRIME, BUT WHICH FALLS SHORT OF THE COMPLETED CRIME; THE DIFFERENCE BETWEEN ATTEMPT AND COMMISSION BEING THAT THE ACTOR STEP FAILS TO PRODUCE THE RESULT INTENDED.

BROADHEAD V. STATE, 24 ALA. APP. 576, 139 So. 115 (1932.)

SINCE THE EVIDENCE CREATED MERELY A SUSPICION OF GUILT, IT WAS WHOLLY INSUFFICIENT TO SUPPORT A CONVICTION. RUFFIN V. STATE, 513 So. 2d 63 (ALA. CRIM. APP. 1987)

AN ATTEMPT NECESSARILY LIES SOMEWHERE BETWEEN MERE INTENT, WHICH ALONE IS NOT PUNISHABLE AND THE COMPLETED OFFENSE [13A-4-2]

"COURTS FAILURE TO GIVE THE CHARGES ON THE LESSER INCLUDED OFFENSES" THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO DEFENDANT IN NOT INSTRUCTING THE JURY AS TO THE LESSER INCLUDED OFFENSES. MATKINS V. STATE 497 So. 2d 194 (ALA. CRIM. APP. 1985). AFF'D.

INSTRUCTION THAT DEFENDANTS MERE PRESENCE AT CRIME SCENE WAS NOT COMPLICITY ADEQUATELY COVERED THE DEFENDANTS REQUESTED CHARGE THAT MERE KNOWLEDGE OF THE CRIME WAS NOT SUFFICIENT TO SHOW COMPLICITY. MANZEGON V. STATE, 740 So. 2d 444

THE APPELLANT ARGUES, INTER ALIA, THAT THIS CAUSE SHOULD BE REMANDED TO THE CIRCUIT COURT FOR AN EVIDENTIARY HEARING ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. THE STATE AGREES. DELL V. STATE, 717 So. 2d 206 (ALA. CRIM. APP. 1996)

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

I STAND TO VERIFY THAT MY TRIAL COUNSEL WAS INEFFECTIVE AT TRIAL AND ON APPEAL. FIRST OF ALL SHE ALLOWED THE STATE TO INTRODUCE FALSE EVIDENCE TO WIT: A SKI MASK ON WHICH I HAD TOLD HER THAT THE LANETT POLICE OFFICERS DID NOT TAKE THIS SKI-MASK FROM ME AND THE VIDEO TAPE WOULD SHOW THIS. SHE PROCLAIMED THAT SHE DID NOT WANT THE JURY TO SEE THE GUNS IN MY MUSTANG AND TO FIND OUT THAT THEY WERE STOLEN IN ANOTHER BURGLARY. TO MY RECOLLECTION THE MOTION OF LIMINE ACCURATELY COVERED THIS AREA OF CONCERN THEREFORE WE HAD A HEATED DEBATE ON THIS ISSUE ON WHICH SHE REFUSED MY REQUEST AND OPPOSED OF IT EVERY TIME THAT I BROUGHT IT UP. THIS ARGUMENT WENT ON FOR A COUPLE OF HOURS OF SHE AND I DEBATING ON WHICH WAS MORE IMPORTANT REVEALING THE ADMISSON OF FALSE EVIDENCE OR HIDING THE SPECIFIC PLACE WHERE TWO GUNS CAME FROM. THIS ALONE SHOWS THAT THIS COUNSEL KYLA HELTON GROSS WAS DEFICIENT AND SUCH PERFORMANCE PREJUDICED MY DEFENSIVE STANCE AT TRIAL.

SHE ALSO LOST MY APPEAL.

IN CASES IN WHICH TRIAL COUNSEL ALSO SERVED AS APPELLATE COUNSEL ARE COGNIZABLE IN A PETITION UNDER THIS RULE.

GRAYSON V. STATE 675 So. 2D 516 (ALA. CRIM. APP. 1995)

BEDWELL V. STATE 710 So 2D 493 (1998)

SHE ALSO WAS INEFFECTIVE AT OTHER PHASES OF THIS TRIAL. I REQUESTED HER TO OBJECT TO THE CO-DEFENDANTS ADMISSION OF HIS GUILTY PLEA AS HE TESTIFIED THAT HE ACCEPTED THE TIME THAT HE WAS GIVEN WITH NO PROBLEM. AND ASKED HER TO CROSS-EXAMINE BY ADMITTING HIS WITHDRAWAL OF GUILTY PLEA AS A SOLID DEFENSE SHE ALSO OPPOSED MEANING THAT ADMISSION OF A CO-DEFENDANTS GUILTY PLEA WILL SUBSTANTIALLY AFFECT THE DEFENDANTS RIGHT TO A FAIR TRIAL IN THAT THE JURY MAY REGARD THE ISSUE OF THE REMAINING DEFENDANTS GUILT AS SETTLED AND THAT THE TRIAL IS A MERE FORMALITY THEREFORE, REVERSIBLE ERROR WAS COMMITTED WHERE THE STATE ASKED A WITNESS WHETHER A CO-DEFENDANT WAS ON DEATH ROW AND THE COURT FAILED TO GIVE A SUFFICIENT LIMITING INSTRUCTION TOMLIN V. STATE, 591 SO. 2D 550 (ALA. CRIM. APP. 1991)

I ALSO ASKED HER TO OBJECT TO THE DISTRICT ATTORNEY BILL LISENBY CLOSING ARGUMENT ON WHICH HE STATED FORCEFULLY THAT HE BELIEVED THE CO-DEFENDANT TESTIMONY. SHE ONCE AGAIN OPPOSED ME AND I BELIEVE THAT FOR HIM TO STATE SUCH WORDS, HAD A POWERFUL IMPACT ON THE JURY ON WHICH PREJUDICED ME AT THE END OF THIS TRIAL. THIS WAS PART OF HER DEFICIENT PERFORMANCE

REMARKS OF THE PROSECUTOR, VOUCHING FOR THE CREDIBILITY OF THE STATES WITNESS, HELD CLEARLY ERRONEOUS WHERE HE STATED IN THE STRONGEST LANGUAGE, HIS PERSONAL BELIEF IN THE WITNESS CREDIBILITY. COMMENTS OF THE PROSECUTOR, TAKEN AS A WHOLE, COULD REASONABLY HAVE LED THE JURY TO BELIEVE THAT THE PROSECUTOR POSSESSED ADDITIONAL REASONS FOR KNOWING THAT THE STATES WITNESS TESTIFIED TRUTHFULLY, REASONS NOT KNOWN TO THE JURY. GUTHRIE V. STATE 616 So. 2D 914

WHERE DEFENDANT IS REPRESENTED AT TREAL AND ON APPEAL BY SAME COUNSEL, CLAIMS OF INEFFECTIVE ASSISTANT OF COUNSEL ARE COGNIZABLE IN PETITION FOR POST-CONVICTION RELIEF. PROPERLY RAISED. EX PARTE BESSEMAR 600 So. 2D 978, 979 (ALA. 1992)

MERE TORTUS ALLEGATIONS WARRANT EITHER AN EVIDENTIARY HEARING OR AN ADEQUATE EXPLANATION FOR THEIR DENIAL. BENEFIELD V. STATE, 583 So. 2D 1370 (ALA. CRIM. APP. 1991.)

VIII. THE VALUE OF A WAIVER OF RIGHTS FORM.

I CHRISTOPHER MCCULLOUGH STAND TO CHALLENGE THE CRITERIA FOR SIGNING SUCH FORM TO THE DEGREE OF PROPER PROSPECTIVENESS OF ENLIGHTMENT. MEANING TO WIT: IF YOU ALLOW YOURSELF TO BE QUESTIONED BY DETECTIVES DOES NOT MEAN THAT YOU AUTOMATICALLY MADE A STATEMENT. THIS BECAUSE IN TOTAL CONFLICT ON WHICH THIS FORM STATES. YOU APPROVED OF THEM TO QUESTION YOU AN KNOWING THAT YOUR RIGHTS SPECIFICALLY STATE THAT YOU CAN STOP ANSWERING QUESTIONS OR STOP THIS INTERROGATION AT ANY GIVEN TIME. THIS IS THE PROPER TECHNIQUE OF AN DEFENDANT WHO WAIVES SUCH RIGHTS AND ENLIGHT AN UNSIGNED STATEMENT SUBMITTED BY A DETECTIVE IS CONTRADICTORY TO THESE STANDARDS. THEY PROCLAIMED THAT THE STATEMENT WAS TRUE AND CORRECT BUT I DID NOT SIGN ENDORSE VERIFY TO SUCH ALLEGATIONS ON WHICH I FORCIBLY STAND TO CHALLENGE THIS ACT THAT CORPUS DELICTI HAS NOT BEEN ESTABLISHED.

VALID WAIVER OF MIRANDA RIGHTS CANNOT BE ESTABLISHED BY SHOWING MERELY THAT THE ACCUSED RESPONDED TO POLICE-INITIATED INTERROGATION EVEN AFTER BEING ADVISED OF HIS OR HER RIGHTS. WEAVER V. STATE 710 So. 2d 480

MEMORANDA PREPARED BY THE INVESTIGATING OFFICER ARE NOT ACTUALLY STATEMENTS AS DERIVED IN EX PARTE PATE AND ARE SPECIFICALLY EXCLUDED FROM DISCOVERY. GIBSON V. STATE, 355 SO.2D 784 (ALA.CRIM.APP. 1978).

CONCLUSION

I THE DEFENDANT IN THIS CASE DED HEREBY BY BRING PROPER CHALLENGE TO THIS CHARGE BY POSTCONVICTION RULE 32 ON WHICH WAS DENIED SOME 18 MONTHS AFTER FILING. NO EVIDENTIARY HEARING WAS HELD TO DETERMINE THE ISSUES ON THE FACE OF THIS PETITION ON WHICH WERE MERITORIOUS AND WOULD HAVE GRANTED PETITIONER RELIEF. THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGHOUT THIS WHOLE SERIES OF EVENTS THE VERDICT WAS CONTRARY TO LAW, THE TRIAL JUDGE VIOLATED HIS DISCRETION AT TRIAL AND SENTENCING, STATE ADMITTED FALSE EVIDENCE ON WHICH THIS GROUND ALONE CONSTITUTE AUTOMATIC ACQUITTAL ON WHICH THIS IS THE MOST DISPUTIVE ISSUE IN THIS PETITION THEREFORE AN EVIDENTIARY HEARING WAS APPROPRIATE IN THIS MATTER. THE COURT OF CRIMINAL APPEALS STATES THAT I GAVE SELF-INCRIMINATING TESTIMONY AT TRIAL. THEREFORE IN THIS WRIT OF HABEAS CORPUS I SEEK FULL RELIEF OF IMMEDIATE ACQUITTAL OF THE SAID CHARGE.

ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DATE SERVED AN EXACT SAME COPY OF THE FOREGOING BRIEF AND ARGUMENT TO THE: CLERK OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT P.O. BOX 711 MONTGOMERY, ALABAMA 36101-0711 POSTAGE PREPAID ON THIS THE 28TH DAY OF DECEMBER 2006.

PURSUANT TO RULE 34(A): I HAVE DEMANDED ORAL ARGUMENT AND HAVE SO INDICATED ON THE COVER OF MY BRIEF.

SIGNATURE Christopher C. McCullough

CHRISTOPHER C. MCCULLOUGH PRO SE